83682-5

NO. 27548-5-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ROBERT ALAN BROWN,

Defendant/Appellant.

APPELLANT'S BRIEF

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2. Mr. Brown's conviction for felony-murder is based upon the unconstitutional conviction for first degree kidnapping.

3. The evidence is insufficient to convict Mr. Brown of felony-murder.

4. Inclusion of WPIC 25.01 in the jury instructions deprived Mr. Brown of a fair and constitutional trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Const. art. I, §§ 3 and 22.

5. Mr. Brown did not receive effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

6. Cumulative error deprived Mr. Brown of a fair and constitutional trial.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Does the inclusion, in Instructions 15 and 16, of an uncharged alternative to the crime of first degree kidnapping require reversal of Mr. Brown's conviction pursuant to the Sixth Amendment to the United States Constitution and Const. art. I, § 22? (CP 340; Appendix "A"; Appendix "B")

2. Should a conviction for felony-murder be reversed when the conviction on the predicate felony is reversed due to constitutional error?

3. Did the State meet its burden of proof that Mr. Brown was an accomplice to felony-murder; *i.e.,* is there sufficient evidence to prove each and every element of the offense beyond a reasonable doubt?

4. Did inclusion of WPIC 25.01 in the jury instructions deprive Mr. Brown of a fair and constitutional trial due to misstating the law? CP 340; Instruction 5; Appendix "C")

5. Did defense counsel's failure to object to the erroneous instructions constitute ineffective assistance of counsel?

6. Does cumulative error require reversal of the convictions and remand for a new trial?

STATEMENT OF CASE

Sebastian Esquibel's body was found beneath a woodpile near Darknell Road on January 16, 2006. His hands and feet were tied with jumper cables. There was a bag over his head. He had been shot in the back of the head. (Trial RP 396, ll. 9-16; RP 397, ll. 1-8; ll. 14-19; RP 418, ll. 14-16)

Detective Dresback was assigned the case. Due to decomposition of the body arrangements were made following the autopsy to transfer the remains to Seattle for examination by a forensic anthropologist. (Trial RP 407, ll. 5-6; ll. 10-11; RP 412, ll. 5-6; RP 413, l. 20 to RP 414, l. 2; RP 420, ll. 16-19; RP 421, ll. 17-24)

Dr. Taylor is a forensic anthropologist. A forensic anthropologist is an expert in skeletal anatomy and bone. She examined the remains on January 25, 2006. She determined that the person was an Hispanic male between twenty-two (22) and thirty (30) years of age. He was 5'2" to 5'8" tall. A positive identification did not occur until Mr. Esquibel's earlier CAT scan from Spokane Valley Hospital was examined. (Trial RP 428, ll. 3-4; ll. 12-14; RP 430, ll. 6-9; RP 438, l. 1; ll. 16-20; RP 440, ll. 9-15; RP 441, ll. 5-8; RP 442, l. 1 to RP 444, l. 9)

Danny Gurule is Mr. Esquibel's father. He talked to Mr. Esquibel on May 18, 2005. He wired him money to come home. He never saw or

heard from his son again. (Trial RP 385, ll. 10-15; RP 387, ll. 1-15; ll. 21-22)

Levoy Burnham and Shannon Burnham were living in a fifth wheel trailer behind Mr. Brown's house at 5006 North Helena in May 2005. (Trial RP 446, ll. 6-11; ll. 14-24; RP 503, ll. 9-15)

Mr. Burnham tried to arrange a drug deal involving Mr. Esquibel and Carlton Hritsco. Eight hundred ($800.00) dollars was fronted to Mr. Esquibel. He did not deliver the drugs. He did not return the money. (Trial RP 449, ll. 15-19; RP 480, ll. 3-12; RP 480, ll. 18-20; RP 483, ll. 19-25; RP 521, ll. 5-13)

Mr. Burnham brought Mr. Esquibel to the fifth wheel trailer. His hands were duct-taped. He was naked except for his underwear. Mr. Burnham continuously asked Mr. Esquibel - "Where's the money?" (Trial RP 448, ll. 17-25; RP 452, ll. 2-4; RP 454, ll. 2-3; ll. 9-12)

While Mr. Esquibel was being held in the trailer, Mr. Hritsco and Theodore Kosewicz arrived. Mr. Hritsco brought a gun to the trailer at Mr. Burnham's request. (Trial RP 450, ll. 10-13; RP 452, ll. 11-13; RP 453, ll. 8-14; RP 484, ll. 5-7; ll. 15-20)

Mr. Kosewicz is known as an enforcer. He kicked Mr. Esquibel and questioned him about the money. (Trial RP 453, ll. 22-24; RP 521, ll. 15-20)

Mr. Burnham eventually called Amber Johnson. He asked her to bring her van over to the trailer. When she arrived she saw Mr. Esquibel

tied up. David Collins was with her. Mr. Collins and Mr. Burnham pushed Mr. Esquibel into the van. Mr. Kosewicz also arrived and got into the van. Ms. Johnson recalled seeing Mr. Brown very briefly when Mr. Esquibel was being loaded into the van. (Trial RP 456, ll. 2-17; ll. 23-25; RP 457, ll. 8-11; RP 458, ll. 11-16; RP 612, ll. 14-17; RP 614, ll. 15-17; RP 617, ll. 4-11; ll. 18-22; RP 620, ll. 5-12)

Mr. Burnham directed Ms. Johnson to drive to Mr. Hritsco's. Mr. Hritsco came out and told them to leave. After leaving Mr. Hritsco's, Mr. Burnham and Mr. Kosewicz argued about what they should do. It was only after Mr. Hritsco refused to talk to them that they formulated any plan. Ms. Johnson drove to her house. Mr. Esquibel was taken into the basement and put into the laundry room. (Trial RP 618, ll. 12-13; RP 619, ll. 7-14; RP 621, ll. 17-21; RP 642, ll. 2-15)

Ms. Johnson believed that Mr. Esquibel was being "taxed." "Taxing" constitutes an assault for squelching on a drug deal. (Trial RP 622, ll. 15-21; RP 616, ll. 8-12)

Mr. Esquibel was later placed back in the van. Ms. Johnson continued to drive. Mr. Burnham, Mr. Kosewicz and Mr. Collins were also in the van. Mr. Kosewicz directed Ms. Johnson to drive into the country. (Trial RP 622, ll. 6-9; RP 624, ll. 16-22)

Mr. Kosewicz told Ms. Johnson to stop the van. He and Mr. Burnham took Mr. Esquibel into a field. Ms. Johnson heard a gunshot. After Mr. Kosewicz and Mr. Burnham returned to the van she was told to drive

away. Mr. Kosewicz told everyone to keep their mouth shut and that he'd replace the carpet in her van. The carpet was changed within the next two (2) days. (Trial RP 627, ll. 8-13; RP 628, ll. 12-21; RP 631, ll. 5-9; ll. 17-25)

A search warrant was obtained for Mr. Brown's residence and the fifth wheel trailer. It was served on March 2, 2006. Mr. Brown was questioned after he was advised of his *Miranda*[1] warnings. (Trial RP 8, l. 19 to RP 9, l. 1; RP 9, ll. 5-6)

On March 15, 2006 Mr. Brown contacted detectives at the Spokane Public Safety Building. He told them that he wanted to give them information on Mr. Esquibel's death. He was again advised of his rights. (Trial RP 12, ll. 4-6; ll. 11-13)

Mr. Brown tried to cut a deal with the detectives. He had a pending burglary charge. Efforts were made to enter into a "free talk" agreement. The agreement was never signed. Following a CrR 3.5/3.6 hearing on October 9, 2008 the trial court ruled that no "free talk" agreement existed. (10/09/08 RP 1 *et seq*; CP 334; CP 337)

Mr. Brown told Detective Marske that there were four (4) people involved with Mr. Esquibel's death and that the trailer had been cleaned by those people. The people included Mr. Burnham, Ms. Burnham and

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[1] *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed.2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966)

Mr. Hritsco. He would not confirm if Mr. Kosewicz was involved. (Trial RP 518, l. 16; RP 519, ll. 15-24; RP 520, ll. 12-16; RP 521, ll. 1-3)

Mr. Brown also told the detective that he was inside the trailer and saw Mr. Esquibel. He remained in the trailer with Ms. Burnham when Mr. Burnham left. He was holding the gun that Mr. Hritsco had brought to the trailer. (Trial RP 452, ll. 16-20; RP 522, ll. 2-4; ll. 7-10; RP 525, ll. 18-20; RP 529, ll. 22-25; RP 659, l. 22 to RP 660, l. 5)

Ms. Burnham recalled Mr. Brown asking Mr. Esquibel about the money. Mr. Brown also told Mr. Esquibel he should not have done it. (Trial RP 464, ll. 6-11)

Mr. Brown was present when there was a discussion as to Mr. Esquibel's involvement with Mexican gangs. He volunteered to find out if Mr. Esquibel was a Mexican gangster. He went to Amanda Brown's (aka Amanda Demers) and learned that Mr. Esquibel was not involved with any Mexican gang. He returned to the trailer and told the others what he had learned. (Trial RP 526, ll. 9-14; ll. 21-22; RP 527, ll. 2-6; Exhibit 66)

Mr. Brown admitted that he hit Mr. Esquibel one (1) time in the head. He had skinned knuckles when he went to Ms. Brown's house. (Trial RP 529, ll. 16-18; RP 647, ll. 3-9)

Mr. Brown advised Detective Marske that he believed Mr. Burnham and the others were only trying to scare Mr. Esquibel. They only wanted their money back. He did not believe they intended to kill him. (Trial RP 523, ll. 22-24; RP 524, ll. 10-13)

An Information was filed on November 14, 2007 charging Mr. Brown with first degree kidnapping under Count II, conspiracy to commit first degree kidnapping under Count IV and first degree assault under Count V. (CP 1)

An Amended Information was filed on March 20, 2008. Mr. Brown was now charged with first degree murder, first degree kidnapping, conspiracy to commit the first degree kidnapping and first degree assault. (CP 25)

Various continuances and waivers were filed. Trial commenced on October 13, 2008. (CP 18; CP 22; CP 27; CP 29; CP 31)

Prior to trial a Second Amended Information was filed. Count I charged Mr. Brown with first degree murder in the alternative. The alternatives were premeditation and felony-murder based upon first degree kidnapping. Count II charged Mr. Brown with first degree kidnapping. Count III involved conspiracy to commit first degree kidnapping. Each count carried a firearm enhancement. (CP 147)

Mr. Brown did not object to any of the jury instructions. Instruction 5 is no longer a recommended instruction. Instructions 15 and 16 contain an uncharged alternative as to first degree kidnapping.

The jury found Mr. Brown not guilty of premeditated first degree murder. He was found guilty of felony-murder based upon first degree kidnapping. He was found guilty of first degree kidnapping. He was found not guilty of conspiracy to commit first degree kidnapping. The

jury also determined that the firearm enhancements applied to the two (2) guilty verdicts. (Trial RP 763, l. 15 to RP 764, l. 25; CP 377; CP 378; CP 379; CP 380; CP 381)

Mr. Brown filed a motion to arrest judgment on October 30, 2008. The trial court denied the motion on November 21, 2008. (11/21/08 RP 3, l. 9 to RP 4, l. 17; RP 6, l. 2 to RP 7, l. 13; CP 382)

Judgment and sentence was entered on November 24, 2008. The trial court ruled that Counts I and II merged. Mr. Brown was sentenced to four hundred and eighty (480) months plus a sixty (60) month firearm enhancement. The trial court ruled that the enhancements merged. (CP 421)

Mr. Brown had previously filed a Notice of Appeal on October 30, 2008. (CP 390)

The State filed a cross-appeal concerning the firearm enhancements on December 3, 2008. (CP 437)

SUMMARY OF ARGUMENT

The inclusion of an uncharged alternative of first degree kidnapping in the jury instructions violated Mr. Brown's constitutional rights under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

Mr. Brown's first degree kidnapping conviction must be reversed and remanded for a new trial.

Mr. Brown's felony-murder conviction is based upon his conviction for first degree kidnapping. Since the first degree kidnapping conviction must be reversed and remanded for a new trial, the predicate felony fails for the felony-murder conviction. That conviction must also be reversed and remanded for a new trial.

The State failed to prove, beyond a reasonable doubt, that Mr. Brown committed the crime of felony-murder based upon the predicate felony of first degree kidnapping.

The State's theory that Mr. Brown was an accomplice to the kidnapping cannot withstand judicial scrutiny and is contrary to the evidence presented.

Inclusion of WPIC 25.01 in the jury instructions deprived Mr. Brown of a fair and constitutional trial. WPIC 25.01 is no longer a valid jury instruction. There is no provision in the accomplice liability statute, RCW 9A.08.020(3), that imposes a duty to act.

Defense counsel was ineffective when he failed to object to the erroneous jury instructions on first degree kidnapping and homicide (WPIC 25.01).

Cumulative error requires reversal of Mr. Brown's convictions and remand for a new trial.

ARGUMENT

I. FIRST DEGREE KIDNAPPING

Count II of the Second Amended Information reads:

> KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant ROBERT ALAN BROWN, as an actor and/or accomplice of Theodore M. Kosewicz, Levoy Goff Burnham, and Carlton James Hritsco, in the State of Washington, on or about between May 18, 2005, and June 13, 2005, did, **with intent to inflict bodily injury** on SEBASTIAN L. ESQUIBEL, intentionally abduct such person, and the defendant, as an actor and/or accomplice of Theodore M. Kosewicz, Levoy Goff Burnham, and Carlton James Hritsco, being at said time armed with a firearm under the provisions of 9.94A.602 and 9.94A.533(3) ....

(Emphasis supplied.)

The State charged first degree kidnapping based on "intent to inflict bodily injury." Instructions 15 and 16 added the alternative means of "intent to inflict extreme mental distress."

Mr. Brown contends that even though there was evidence of "intent to inflict extreme mental distress" on Mr. Esquibel, that instructing the jury on that alternative was constitutional error.

Const. art. I, § 22 provides, in part:

> In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him [and] to have a copy thereof ....

The Sixth Amendment to the United States Constitution, provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right to ... be informed of the nature and cause of the accusation ....

These constitutional provisions have become known as the "essential elements" rule. This means that a criminal defendant must be fully advised of each and every element of the offense that he is accused of committing.

> 'The primary goal of the "essential elements" rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against.' *State v. Kjorsvik,* 117 Wn.2d 93, 101, 812 P.2d 86 (1991). Merely reciting the statutory elements of the charged crime may not be sufficient.

State v. Greathouse, 113 Wn. App. 889, 899-900, 56 P.3d 569 (2002), *reconsideration denied, review denied,* 149 Wn.2d 1014, 69 P.3d 875.

Mr. Brown was never informed that he would have to defend against the statutory alternative of "intent to inflict extreme mental distress."

> When a statute provides that a crime may be committed in alternative ways or by alternative means, the information may charge one or all of the alternatives, provided the alternatives are not repugnant to one another. *State v. Severns,* 13 Wn.2d 542, 548, 125 P.2d 659 (1942). **When the information charges only one of the alternatives, however, it is error to instruct the jury**

> **that they may consider other ways or means by which the crime could have been committed**, regardless of the range of evidence admitted at trial. *State v. Severns, supra.* The manner of committing a crime is an element and the defendant must be informed of this element in the information in order to prepare a proper defense.

State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). (Emphasis supplied.)

The State failed to comply with the "essential elements" rule. It did not include the statutory alternative of "intent to inflict extreme mental distress" in the Second Amended Information.

The trial court committed constitutional error by instructing the jury that they could consider this uncharged alternative to the crime of first degree kidnapping.

> The error of offering an uncharged means as a basis for conviction is prejudicial **if it is possible** that the jury might have convicted the defendant under the uncharged alternative.

State v. Doogan, 82 Wn. App. 185, 189, 917 P.2d 155 (1996). (Emphasis supplied.)

Mr. Brown asserts that there is no way to analyze which alternative the jury considered in connection with its determination that he was guilty of first degree kidnapping.

The evidence clearly establishes that Mr. Brown was only peripherally involved with any kidnapping. Moreover, the fact that the jury found

Mr. Brown not guilty of conspiracy to commit first degree kidnapping supports his position of limited involvement.

The evidence establishes that Mr. Brown only hit Mr. Esquibel one (1) time. It also establishes that he sat in the trailer with a gun in his hand while Mr. Esquibel was there.

This minimal physical interaction between Mr. Brown and Mr. Esquibel cannot be said to preclude the jury's considering the substantial evidence relating to "intent to inflict extreme mental distress" found in the record.

Mr. Brown urges that his conviction for first degree kidnapping be reversed and remanded for a new trial.

II. FELONY-MURDER

Mr. Brown's felony-murder conviction is based upon the jury's determination that he was guilty of first degree kidnapping. Since the first degree kidnapping conviction involves an improper jury instruction, if it is reversed and remanded for a new trial, then, of necessity, the felony-murder conviction must be reversed and remanded for a new trial.

Count I of the Second Amended Information states:

> PREMEDITATED MURDER IN THE FIRST DEGREE, WITH AGGRAVATING CIRCUMSTANCES, committed as follows: That the defendant ROBERT ALAN BROWN, as an actor and/or accomplice of Theodore M. Kosewicz, Levoy Goff Burnham, and Carlton James Hritsco, in the State of Washington, on or about between May 18, 2005, and June 13, 2005, with premedi-

> tated intent to cause the death of another person, did cause the death of SEBASTIAN L. ESQUIBEL, a human being, said death occurring on or between May 18, 2005, and June 13, 2005, and the murder was committed in the course of, in furtherance of, or in immediate flight from the crime of Kidnapping in the First Degree, and the defendant, as an actor and/or accomplice of Theodore M. Kosewicz, Levoy Goff Burnham, and Carlton James Hritsco, being at said time armed with a firearm under the provisions of 9.94A.602 and 9.94A.533(3),
>
> And further charges the following crime, as an act connected with and as a crime alternative to Premeditated Murder in the First Degree, MURDER IN THE FIRST DEGREE, committed as follows: That the defendant, ROBERT ALAN BROWN, as an actor and/or accomplice of Theodore M. Kosewicz, Levoy Goff Burnham, and Carlton James Hrisco, in the State of Washington, on or about between May 18, 2005 and June 13, 2005, **while committing or attempting to commit the crime of First Degree Kidnapping, and in the course of and in furtherance of said crime and in immediate flight therefrom, did cause the death of SEBASTIAN L. ESQUIBEL**, a human being, not a participant in such crime, said death occurring on or about between May 18, 2005 and June 13, 2005 ....

(Emphasis supplied.)

The jury found Mr. Brown not guilty of premeditated first degree murder. It is only the felony-murder charge that remains under consideration.

The felony-murder charge is based upon the crime of first degree kidnapping. Since instructional error precludes a determination of which

alternative to first degree kidnapping was relied upon by the jury in reaching its verdict, and that conviction must be reversed as constitutionally defective, then there is no surviving felony to support the felony-murder conviction.

Mr. Brown cannot be retried on the crime of premeditated first degree murder. He can only be retried on felony-murder.

Mr. Brown maintains that his conviction for first degree felony-murder must be reversed and remanded for a new trial based upon the foregoing argument.

In addition, in the following section of this brief. Mr. Brown maintains that there is insufficient evidence to support the charge of first degree felony-murder. If the Court agrees, then the first degree felony-murder conviction should be reversed and dismissed.

III. SUFFICIENCY OF THE EVIDENCE

Whenever a challenge to the sufficiency of the evidence is raised

> "... the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*."

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), *citing Jackson v. Virginia,* 443 U.S. 307, 61 L. Ed.2d 560, 99 S. Ct. 2781 (1979).

The State did not present an iota of evidence that Mr. Brown was involved in the actual kidnapping of Mr. Esquibel. The evidence estab-

lishes that Mr. Brown became aware, after the fact, that Mr. Esquibel was being held in the fifth wheel trailer.

The State charged Mr. Brown with first degree kidnapping as well as conspiracy to commit first degree kidnapping. "Conspiracy requires an agreement, while accomplice liability does not." *State v. Markham,* 40 Wn. App. 75, 88, 697 P.2d 263 (1985).

The fact that the jury found Mr. Brown not guilty of conspiracy to commit first degree kidnapping indicates that there was no agreement between Mr. Brown and anyone else to commit the crime of first degree kidnapping.

Thus, in order to find Mr. Brown guilty of first degree kidnapping, the jury had to determine that he was either a principal or an accomplice.

The principal is the person who actually commits the crime. An accomplice is the person who in some manner aids in the commission of the crime. Instruction 10 sets forth the definition of accomplice liability. Instructions 13 and 14 define first degree felony-murder and set out the elements in a to-convict instruction. (CP 340; Appendices "D," "E" and "F")

Mr. Brown's involvement consists of:

1. Being occasionally present while Mr. Esquibel was in the trailer;
2. Asking Mr. Esquibel where the money was;
3. Telling Mr. Esquibel that he should not have done it;

4. Hitting Mr. Esquibel in the head one (1) time;

5. Holding the gun after Mr. Burnham handed it to him;

6. Obtaining information on any involvement by Mr. Esquibel with Mexican gangs;

7. Telling the Burnhams and Mr. Kosewicz what he learned.

> The language of the felony murder provision of the first degree murder statute requires that a "coparticipant" be one who actually commits or attempts to commit the underlying felony. ... Thus, in order for a person to be found guilty of felony murder, the State must prove that he or she committed or attempted to commit a predicate felony *and* that he or she, or a coparticipant, committed homicide in the course of commission of the felony.

State v. Carter, 154 Wn.2d 71, 80, 109 P.3d 823 (2005).

RCW 9A.08.020 defines accomplice liability. Subparagraph (1) provides that "a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable."

Mr. Brown avers that he is not "legally accountable" for the conduct of either Mr. Burnham or Mr. Kosewicz.

RCW 9A.08.020(2) provides, in part:

> A person is legally accountable for the conduct of another person when:
>
> (a) ...
> (b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or
> (c) He is an accomplice of such other person in the commission of the crime.

Neither RCW 9A.32.030(1)(c) (first degree felony-murder) nor RCW 9A.40.020(1) (first degree kidnapping) make Mr. Brown accountable for anyone's conduct. Thus, it can only be pursuant to RCW 9A.08.020(2)(c) that Mr. Brown may be considered an accomplice.

RCW 9A.08.020(3) states:

> A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
> (i) Solicits, encourages, or requests such other person to commit it; or
> (ii) Aids or agrees to aid such other person in planning or committing it ....

Mr. Brown did not solicit, command, encourage, or request anyone to commit the crime of first degree kidnapping.

Mr. Brown did not solicit, command, encourage, or request any person to commit the crime of first degree felony-murder.

Mr. Brown was not present when Mr. Burnham brought Mr. Esquibel to the trailer.

Mr. Brown was not present when Mr. Esquibel was being transported from the fifth wheel trailer to Mr. Hritsco's, then to Ms. Johnson's, then to the scene of his death.

Mr. Brown was not present when Mr. Burnham and Mr. Kosewicz discussed killing Mr. Esquibel.

Mr. Brown was not present when Mr. Esquibel was shot.

The fact that the jury determined that Mr. Brown was not guilty of conspiracy to commit first degree kidnapping negates any claim that Mr. Brown agreed with any person to commit the crime of either first degree kidnapping or first degree felony-murder.

The evidence clearly establishes that Mr. Brown was not involved in Mr. Esquibel's actual death. He was not at the scene. He was not in the van. He remained at home.

Mr. Brown concedes that an accomplice does not need to be present at the time a crime is committed. *See: State v. Dove,* 52 Wn. App. 81, 88, 757 P.2d 990 (1988).

Nevertheless, the record does not support a conclusion that Mr. Brown aided either Mr. Burnham, Ms. Burnham, or Mr. Kosewicz in planning or committing an actual kidnapping.

IV. INSTRUCTIONAL ERROR

The trial court instructed the jury that Mr. Brown had a duty to act. Instruction 5 is based upon former WPIC 25.01. The COMMENT to WPIC 25.01 states, in part: "The instruction is being withdrawn because it is no longer helpful to the jury."

The withdrawal of WPIC 25.01 is based upon the decision in *State v. Jackson,* 137 Wn.2d 712, 722, 976 P.2d 1229 (1999) where the Court stated:

> RCW 9A.08.020(3) ... does not extend accomplice liability to a person ... based on the person's failure to fulfill a duty to come to the aid of another.

Mr. Brown contends that this instruction tainted the rest of the jury instructions. It allowed the jury to convict him based upon his failure to contact law enforcement.

The deputy prosecutor, in closing argument, inferred that Mr. Brown had a duty to act when he stated:

> When Sebastian tries to plead, the moment he had the opportunity to let Sebastian go, what did he do? Nothing.

(Trial RP 749, ll. 15-18)

Then again, in rebuttal argument, the deputy prosecutor stated:

> Doesn't disregard the fact that he had an opportunity to let Mr. Esquibel go and stop this incident.

(Trial RP 754, ll. 9-11)

The inclusion of this instruction not only compounds the other instructional error but also impacts Mr. Brown's right to a constitutionally fair trial. *See:* Const. art. I, §§ 3 and 22; Sixth and Fourteenth Amendments to the United States Constitution.

Jury instructions must correctly state the law. They must be so worded as to be readily understood and not misleading to the ordinary

mind. An erroneous jury instruction deprives a person of a fair and constitutional trial. *State v. Dana,* 73 Wn.2d 533, 537, 439 P.2d 400 (1968); . *see also Yakima v. Irwin,* 70 Wn. App. 1, 10, 851 P.2d 724 (1993).

In the event of a retrial, Instruction 5 should not be given to the jury.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

> To establish ineffective assistance of counsel [a defendant] must show his attorney's performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); *State v. Hendrickson,* 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The first element requires a showing that counsel's performance was deficient. *Hendrickson,* 129 Wn.2d at 77. The second element requires a showing based on reasonable probability that, but for counsel's deficient performance, the result would have been different. *State v. Thomas,* 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If either element of the test is not satisfied, the inquiry ends. *Hendrickson,* 129 Wn.2d at 78.

State v. Prado, 144 Wn. App. 227, 248 (2008).

Mr. Brown asserts that his attorney was not effective based upon the multiple instructional errors involved in his case. The fact that defense counsel did not object to the instructions should not be construed as invited error. Even if it was invited error, a claim of ineffective assistance of counsel allows for review. *See: State v. Aho,* 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

> A counsel's failure to notice and except to an erroneous jury instruction may demonstrate a lack of effective assistance of counsel if the defendant can show that the inaccurate jury instruction prejudiced him or her. Jury instructions are not erroneous if, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his or her theory of the case.

State v. Wilson, 117 Wn. App. 1, 17, 75 P.3d 573 (2003).

The instructions were clearly erroneous. Instruction 5 was based upon former WPIC 25.01 which was withdrawn from circulation. It improperly states the law and misled the jury.

Instructions 13 and 14 include an uncharged alternative to first degree kidnapping. They allowed Mr. Brown to be convicted of an offense he may not have committed. They were given in violation of his constitutional right to be informed of the notice of the charge against him.

Clearly Mr. Brown did not receive effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

VI. CUMULATIVE ERROR

> It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. .... [C]onstitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error.

State v. Lopez, 95 Wn. App. 842, 957, 980 P.2d 224 (1999).

Mr. Brown contends that the constitutional errors which occurred in his case require reversal both independently and cumulatively.

The constitutional error is not harmless. The instructional error allowed the jury to convict him on both an uncharged alternative and a misstatement of the law.

Under the facts and circumstances of Mr. Brown's case it cannot be said that the jury would have reached the same conclusion if it had been properly instructed on the law.

CONCLUSION

The fact that an uncharged alternative to first degree kidnapping was included in Instructions 15 and 16 allowed the jury to improperly convict Mr. Brown. Including an uncharged alternative in jury instructions is a constitutional violation under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

Mr. Brown's first degree kidnapping conviction must be reversed and the case remanded for a new trial.

Since the first degree kidnapping is the predicate felony for Mr. Brown's conviction of felony-murder, it must also be reversed and remanded for a new trial.

Alternatively, if the Court determines that there was insufficient evidence that Mr. Brown was an accomplice to first degree kidnapping, then, and in that event, both charges should be reversed and the case dismissed.

WPIC 25.01 is no longer a valid instruction. Instruction 5 is based upon WPIC 25.01. The instruction allowed the jury to convict Mr. Brown if it believed that he had a duty to act and failed to do so. The prosecuting attorney argued that Mr. Brown had a duty to act.

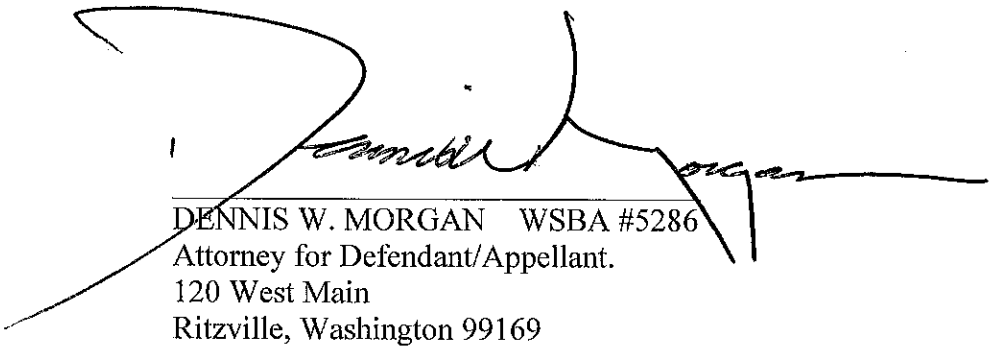
Since WPIC 25.01 is a misstatement of the law concerning accomplice liability, Mr. Brown's conviction as an accomplice to felony-murder must be reversed and remanded for a new trial if it is not otherwise dismissed.

Mr. Brown did not receive effective assistance of counsel in connection with the jury instructions. Ineffective assistance of counsel prejudiced Mr. Brown's case and allowed the jury to convict him upon improper and unconstitutional instructions.

Cumulative error requires reversal of the convictions and remand for a new trial if the convictions are not otherwise dismissed.

DATED this 14th day of July, 2009.

Respectfully submitted,



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APPENDIX "A"

INSTRUCTION NO. 15

A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to inflict bodily injury on the person or to inflict extreme mental distress on that person or on a third person.

APPENDIX "B"

INSTRUCTION NO. 16

To convict the defendant of the crime of kidnapping in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between the 18th day of May, 2005, and the 13th day of June, 2005, the defendant, as an actor and/or accomplice, intentionally abducted Sebastian L. Esquibel;

(2) That the defendant, as an actor and/or accomplice, abducted that person with intent

(a) to inflict bodily injury on the person, or,

(b) to inflict extreme mental distress on that person or a third person; and,

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1) and (3) and any of the alternative elements (2)(a) or (2)(b) have been proved beyond a reasonable doubt, then

it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a) or (2)(b) has been proved beyond a reasonable doubt as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2) or (3), then it will be your duty to return a verdict of not guilty.

APPENDIX "C"

INSTRUCTION NO. 5

Homicide is the killing of a human being by the voluntarily act, procurement, or failure to act of another and is either murder, homicide by abuse, excusable homicide, or justifiable homicide.

APPENDIX "D"

INSTRUCTION NO. 10

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. The person is legally accountable for the conduct of another person when he or she is an accomplice of such person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) Solicits, commands, encourages or requests another person to commit the crime, or

(2) Aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. The person who is present at the scene and ready to assist by his or her presence is aiding in the commission of a crime. However, more than mere presence and knowledge of the crime -- excuse me, however, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

APPENDIX "E"

INSTRUCTION NO. 13

A person commits the crime of murder in the first degree when he or she or an accomplice commits or attempts to commit kidnapping and, in the course of or in furtherance of such crime or in immediate flight from such crime, he or she or another participant causes a death of a person other than one of the participants.

APPENDIX "F"

INSTRUCTION NO. 14

As to Count I, as an alternative, to convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between the 18th day of May, 2005, and the 13th day of June, 2005, Sebastian L. Esquibel was killed;

(2) That the defendant, as an actor and/or accomplice, was committing or attempting to commit first degree kidnapping;

(3) That the defendant, as an actor and/or accomplice, caused the death of Sebastian L. Esquibel in the course of or in furtherance of such crime or in immediate flight from such crime; and,

(4) That Sebastian L. Esquibel was not a participant in the crime; and,

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.